

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

No. 23964-1-III

Respondent,

Division Three

v.

RANDALL S. WAGAR,

UNPUBLISHED OPINION

Appellant.

KULIK, J.—Randall S. Wagar pleaded guilty to first degree child rape. He received a special sex offender sentencing alternative (SSOSA) disposition suspending his 123-month sentence subject to conditions. His case workers reported several violations of those conditions. They commenced SSOSA revocation proceedings. At the revocation hearing, Mr. Wagar admitted the violations and waived his right to confront witnesses. He now challenges the constitutionality of the revocation proceeding. Specifically, Mr. Wagar asserts that the trial court infringed on his due process rights by relying on unsworn hearsay evidence and that the court made an insufficient record to support its decision. Both of these contentions are without merit, and we affirm the trial court.

FACTS

In January 2004, Randall S. Wagar pleaded guilty to first degree rape of a child. On April 26, 2004, he was sentenced to 123 months. The trial court suspended his sentence pursuant to the SSOSA, RCW 9.94A.670.

In November 2004, the community corrections officer (CCO) supervising Mr. Wagar's community placement was notified that Mr. Wagar was violating the SSOSA conditions by frequenting places where minors congregate, by remaining in the presence of a minor, by having contact with a minor, and by failing to comply with his sexual deviancy treatment. The CCO filed a notice of violation with the superior court and recommended Mr. Wagar's SSOSA be revoked.

At the revocation hearing on March 10, 2005, the following colloquy took place between the trial court and Mr. Wagar:

The Court: Have you had an opportunity to discuss with your attorney the fact that the State claims you violated your supervision and that your SSOSA sexual offender sentence, which was suspended earlier should be revoked?

The Defendant: Yes, your Honor.

The Court: Okay. And is it correct, as your counsel has said, that you want to have the Court accept your stipulation to the violations? In other words, you agree with the violations?

The Defendant: Yes, your Honor.

The Court: Okay. In that regard do you understand you do have the right to have a hearing accompanied by what's called due process? That means that the State may certainly be required to put on witnesses, present testimony and evidence, to demonstrate proof of the violations that they have filed against you. Do you understand

that?

The Defendant: Yes, your Honor.

The Court: And you also have the right to have your attorney question those witnesses, put on witnesses of your own, testify on your own behalf, and have the court make a determination whether or not you violated your supervision as the State claims here. Do you understand all that?

The Defendant: Yes, your Honor.

The Court: With that in mind, do you want to have the court find you in violation simply on your agreement; Is that correct?

The Defendant: Yes, your Honor.

Report of Proceedings (March 10, 2005) (RP) at 10-12.

The court then read each alleged violation and asked Mr. Wagar how he wished to plead. Mr. Wagar pleaded guilty to each violation.

The court issued oral findings that Mr. Wagar had been advised of his due process rights, and that Mr. Wagar had previously stipulated to the four violations by his own oral admissions and through counsel. As part of the stipulation, Mr. Wagar specifically waived his right to require the State to put on witnesses and present testimony to prove the violations. The court formally accepted Mr. Wagar's stipulations and waiver.

The court heard Mr. Wagar's violations and the reasons supporting revocation. Three reasons support the revocation. First, Mr. Wagar missed some sexual deviancy treatment sessions and came late to others. Second, Mr. Wagar spent time with a 16-year-old girl. Third, Mr. Wagar contacted a 14-year-old girl while trying to speak to her 17-year-old sister. Additionally, the court reviewed a letter from Mr. Wagar's therapist with

approval from Mr. Wagar's counsel.

The court then allowed Mr. Wagar to present a former employer as a witness. This witness did not challenge the veracity or accuracy of the violation reports. Rather, his employer testified that, prior to his arrest, Mr. Wagar had been reliable and had done satisfactory work.

The court also permitted Mr. Wagar to explain his conduct. Mr. Wagar agreed that he violated each of the SSOSA provisions as alleged and that he knew of the consequences of noncompliance.

The court then listened to the mitigation arguments by Mr. Wagar's counsel. Mr. Wagar was given a final opportunity for allocution.

The court revoked Mr. Wagar's SSOSA and made a record of the reasons in support of revocation. Mr. Wagar's treatment program was difficult, and success required him to recognize the magnitude of the task and apply himself. Instead, Mr. Wagar had basically "flaunted all the conditions" and had not "paid much attention to them at all." RP (March 10, 2005) at 37.

Mr. Wagar appeals the revocation.

ANALYSIS

1. Due process and the right to confront witnesses

Mr. Wagar claims that the trial court violated his due process right to confrontation

by allowing hearsay evidence without good cause. We disagree.

A SSOSA is a special procedure authorized by statute that allows a trial court to suspend a sex offender's felony sentence if the offender meets the eligibility criteria as defined by statute. *See State v. Canfield*, 154 Wn.2d 698, 701 n.1, 116 P.3d 391 (2005); RCW 9.94A.670. The revocation of a suspended sentence under SSOSA is not part of a criminal prosecution and involves only a conditional right. Therefore, an alleged violation of the right to confrontation in a SSOSA revocation hearing is reviewed under the due process clause of the Fourteenth Amendment, rather than the confrontation clause of the Sixth Amendment. *State v. Abd-Rahmaan*, 154 Wn.2d 280, 286-88, 111 P.3d 1157 (2005). We review a trial court's decision to revoke a SSOSA for abuse of discretion and review an alleged violation of due process de novo. *See, e.g., State v. Warner*, 125 Wn.2d 876, 882-83, 889 P.2d 479 (1995); *State v. Kuhn*, 81 Wn.2d 648, 650, 503 P.2d 1061 (1972).

Although a person's liberty interest under a conditional suspended sentence is very limited, that person is entitled to minimal due process rights. *State v. Nelson*, 103 Wn.2d 760, 762-63, 697 P.2d 579 (1985) (citing *Morrissey v. Brewer*, 408 U.S. 471, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972)). This includes the right to confront the State's witnesses and to receive a written statement of the evidence relied on and reasons for revoking. *Nelson*, 103 Wn.2d at 763. However, the right to confrontation in a SSOSA revocation

hearing is not absolute and courts are generally permitted to rely on substitutes for live testimony at such hearings. *State v. Dahl*, 139 Wn.2d 678, 686, 990 P.2d 396 (1999). These substitutes may include materials such as reports, affidavits, and documentary evidence. *Id.*

While hearsay evidence may be admitted and considered by the trial court in a revocation hearing, the court generally must have good cause for relying on this evidence in light of the difficulty in procuring witnesses. *Abd-Rahmaan*, 154 Wn.2d at 290. There also must be some showing that the hearsay evidence is demonstrably reliable. *Id.*

The limited right to confront witnesses in a revocation hearing for a suspended sentence may be waived. The court in *Nelson* held that a revocation defendant who does not assert his due process rights at the hearing will not be permitted to allege on appeal that the process was deficient. *Nelson*, 103 Wn.2d at 766-67. He “may not sit by, without objection” to hearsay evidence and then claim lack of due process for the first time on appeal. *Id.*

With the assistance of counsel, Mr. Wagar participated in the hearing. After the court carefully advised him of his right to have the State produce its witnesses and to cross examine them, Mr. Wagar affirmatively waived his rights. Significantly, the court did not base its decision solely on the hearsay evidence. Mr. Wagar freely admitted to the violations. The court relied on Mr. Wagar’s knowing and intelligent admissions that

he was guilty of the alleged violations.

Additionally, Mr. Wagar's admissions of his failure to comply with the SSOSA requirements corroborate the hearsay evidence, making that evidence demonstrably reliable. *See Nelson*, 103 Wn.2d at 765. The evidence of Mr. Wagar's specific violations supported the trial court's general finding that he was not making reasonable treatment progress. A trial court is allowed to revoke a SSOSA based on the general failure to accomplish treatment goals and make overall treatment progress. *See Dahl*, 139 Wn.2d at 682-83; RCW 9.94A.670(10).

The trial court relied on demonstrably reliable evidence, including Mr. Wagar's own admissions, in concluding that Mr. Wagar's suspended sentence should be revoked. Mr. Wagar expressly waived his limited right to confront witnesses in this case. Mr. Wagar's due process rights were not violated and the trial court committed no error in revoking Mr. Wagar's suspended sentence.

2. Sufficiency of the record

Mr. Wagar next contends that his due process rights were violated based on the lack of a sufficient record. He claims that the trial court provided no clear statement of facts for its decision to revoke Mr. Wagar's SSOSA.

The trial court may revoke a SSOSA sentence at any time if the court is satisfied with the proof that a condition has been violated. *See* RCW 9.94A.670(10). However,

an offender's right to due process "requires that judges articulate the factual basis for that decision." *Dahl*, 139 Wn.2d at 689. A criminal defendant is guaranteed the right to a "record of sufficient completeness" for purposes of appeal. *State v. Larson*, 62 Wn.2d 64, 67, 381 P.2d 120 (1963) (quoting *Coppedge v. United States*, 369 U.S. 438, 446, 82 S. Ct. 917 (1962), 8 L. Ed. 2d 21). The trial court is not required to make written findings of fact to support its revocation so long as the judge's oral opinion provides a sufficient record of the evidence on which the court relied. *State v. Myers*, 86 Wn.2d 419, 429, 545 P.2d 538 (1976).

Here, the facts were not disputed. The court's decision rested on Mr. Wagar's plea of guilty to the alleged violations. In its oral ruling, the court set forth the undisputed facts it relied upon and explained its rationale for revoking the suspended sentence. We hold that the trial court provided a sufficient record of the evidence to revoke Mr. Wagar's SSOSA.

We hold that Mr. Wagar's due process rights were not impermissibly infringed upon either by the trial court's consideration of hearsay evidence at the revocation hearing, or by the record made by the trial court in support of its decision. We affirm the trial court.

A majority of the panel has determined this opinion will not be printed in the

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Washington Appellate Reports, but it will be filed for public record pursuant to
RCW 2.06.040.

Kulik, J.

WE CONCUR:

Sweeney, C.J.

Schultheis, J.